Office-Supreme Court, U.S.
FILED
AUG 21 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-2017

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROY SNEAD, JR., SHERIFF, AND
FORREST DOBBINS, CLERK OF THE
CIRCUIT COURT OF
CALHOUN COUNTY, ALABAMA,

Petitioners

V.

J. L. STRINGER, ALSO KNOW AS
REV. JUDGE L. STRINGER,

Respondent

RESPONDENT'S BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES A. SULLINS
206 Randolph Avenue, S.E.
Huntsville, Alabama 35801
Telephone (205) 539-9571

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CASES ii

STATEMENT OF THE FACTS 1

SUMMARY OF RESPONDENT'S ARGUMENT .. 7

RESPONSE TO PETITIONERS' ARGUMENT

NUMBER ONE 11
NUMBER TWO 16
NUMBER THREE 22

CONCLUSION 29

CERTIFICATE OF SERVICE 30

TABLE OF CONSTITUTIONAL PROVISIONS

FIFTH AMENDMENT 15

SIXTH AMENDMENT 9, 20

TABLE OF THE CASES

ALDERMAN v. UNITED STATES, 394 U.S. 165, 22 L.Ed. 2d 176, 89 S.Ct. 961 (1969) 8, 15

BEATTY v. UNITED STATES, 389 U.S. 45, 19 L.Ed. 2d 48, 88 S.Ct. 234 (1967) 21

BREWER v. WILLIAMS, 430 U.S. 387, 51 L.Ed. 2d 424, 97 S. Ct. 1232 (1977) 8

CALIFORNIA BANKERS ASSN. v. SHULTZ, 416 U.S. 78, 39 L.Ed. 2d 850, 94 S.Ct. 1526 8,16

CARNLEY v. COCHRAN, 369 U.S. 506 8 L.Ed. 2d 70, 82 S.Ct. 884 (1962) 21, 25

CARVEY v. LeFEVRE 611 F.2d 18, 23 (2nd Cir. 1979) 25

CHAPMAN v. CALIFORNIA, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967) 10, 24

EBERHARDT v. BORDENKIRCHER, 605 F.2d 275 (6th Cir. 1975) 25

FAHY v. CONNECTICUT, 375 U.S. 85, 11 L.Ed 2d 171, 84 S.Ct. 229 (1963) 11, 27

FARETTA v. CALIFORNIA, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975) 9, 21

JACKSON v. VIRGINIA, 443 U.S. 307, 61 L.Ed. 2d 560, 99 S.Ct. 2781 (1979) 22

JOHNSON v. ZERBST, 304 U.S. 458, 28 L.Ed. 1461, 58 S.Ct. 1019 (1938) 10, 21

MASSIAH v. UNITED STATES, 270 U.S. 201, 12 L.Ed. 2d 246, 84 S.Ct 8

McLEOD v. OHIO 381 U.S. 356, 14 L.Ed. 2d 682, 85 S.Ct. 1556 (1965) 8, 20

RHODE ISLAND v. INNIS, 446 U.S. 291, 64 L.Ed. 2d 297, 100 S.Ct. 1682 (1980) 9, 18

STRINGER v. STATE, (Cr. App. Ala. 1979), 372 So. 278 11

UNITED STATES v. ANDERSON, 523 F.2d 1192 (5th Cir. 1975) 25

UNITED STATES v. HARTMAN, 627 F.2d 7 (6th Cir. 1980) 25

UNITED STATES v. HENRY, 447 U.S. 264, 65 L.Ed. 2d 115, 100 S.Ct. 2183 (1980) 9

UNITED STATES v. MILLER, 425 U.S. 435, 48 L.Ed. 2d 71, 96 S.Ct. 1619 (1976) 8, 11

UNITED STATES v. YEAGER, 476 F.2d 613 (3rd Cir. 1973) 25

STATEMENT OF THE FACTS

Respondent (hereinafter referred to as Stringer) was the Mayor of Hobson City, Alabama during all times relevant to this case. He was indicted by the October 1977 Grand Jury of Calhoun County, Alabama on a two-count indictment charging forgery and embezzlement. Both charges were based on a check dated October 31, 1974 drawn on the banking account of Hobson City and made payable to "William Malone". The face of the check was signed by Stringer as Mayor and Margaret Bell as City Clerk. The check was endorsed in the names of William Malone and Stringer.

Approximately two or three months after Stringer had been indicted and some four or five months before trial, the prosecuting district attorney, Robert Field, (hereinafter referred to as district attorney) telephoned Stringer in his capacity as prosecuting attorney and obtained thereby an incriminating statement from Stringer (Respondent's Exhibit "A", pp. 120 and 123).

In prosecuting Stringer, the district attorney called five witnesses to the stand, including himself. Robert

Wayne Underwood was called as the state's first witness. He stated that he was an employee of the First National Bank of Anniston and had custody of the questioned checks (Respondent's Exhibit "A", p. 8). His was the only testimony to identify the checks and to confirm that they had passed through the account upon which they were drawn at the bank (Respondent's Exhibit "A", pp. 9-12). On cross-examination he stated that he knew nothing about the drawing, making of or endorsements on the checks and the facts surrounding same (Respondent's Exhibit "A", p. 12).

The state next called William A. Malone (Respondent's Exhibit "A", p. 13). He stated he had been an employee of Hobson City as the fire chief until approximately September 27, 1974 (Respondent's Exhibit "A", p. 14). He identified several checks as having been made out to him but stated he never endorsed the checks or received any money from them(Respondent's Exhibit "A", pp. 15-19). On cross-examination he testified that he did not know for a fact whether Stringer had signed the checks and knew nothing of the facts surrounding the issuance of same(Respondent's Exhibit "A", p. 23). He stated that

when he left his job in September 1974 he had no intent of coming back and had not told Stringer that his brother, Don, would work for him (Respondent's Exhibit "A", p. 24). Under further cross-examination a letter was introduced which was written by William Malone, specifically authorizing his brother, Don, to sign some checks he expected from the city after he left on September 27, 1974 (Respondent's Exhibit "A", p. 26). The rest of his testimony primarily dealt with biases that he may have had toward Stringer (Respondent's Exhibit "A", pp. 26-53).

The state next called Billy W. Moore (Respondent's Exhibit "A", p. 53). He testified that he was a special investigator with the Department of Industrial Relations for the State of Alabama and that in his capacity he had taken a taped statement from Stringer (Respondent's Exhibit "A", p. 54). The tape was admitted into evidence over strenuous objection by Stringer's counsel (Respondent's Exhibit "A", pp. 54-63). In said interview **Stringer denied that he had endorsed William Malone's name on any of the checks and did not know who had** (emphasis added) (Respondent's Exhibit "A", p. 74). Moore further testified as to an agreement Stringer and the Malones

had entered into whereby William Malone's brother, Don, was to work in William's stead and Don was to accept William's checks (Respondent's Exhibit "A", p. 75). Stringer stated that he received none of the funds from the checks and that the checks were paid for actual work done (Respondent's Exhibit "A", p. 78).

Next the state called Donald Ray Malone (Respondent's Exhibit "A", p. 85). He stated he was William Malone's brother and had been employed by Hobson City as the fire chief, a position his brother had earlier held, and police chief during the time the questioned checks were written (Respondent's Exhibit "A", p. 86). He stated that he recalled his brother leaving in September 1974 and he became the fire chief with no pay at the time (Respondent's Exhibit "A", p.88). He was shown each of the checks and he denied he had signed any of them or received any proceeds from them (Respondent's Exhibit "A", pp. 89-90). He later stated he had endorsed one check dated 12/24/74 and had given it back to Stringer but did not receive any proceeds from it (Respondent's Exhibit "A", p.94).

This evidence concluded the state's case except for the testimony of district attorney Field. He placed himself on the stand as his own last witness and testified as to an incriminating statement Stringer made, which was that he "Stringer" had endorsed William Malone's name to the back of the questioned check (Respondent's Exhibit "A", pp.119-120). This testimony was allowed over vigorous objection by Stringer's trial counsel. On cross-examination and voir dire the following crucial facts were revealed:

1. That the district attorney **initiated the call in his capacity as a prosecuting official** (Respondent's Exhibit "A", pp. 114, 123). (Emphasis added)

2. That the call was made approximately two or three months after Stringer had been indicted and pled not guilty and some four or five months before trial (Respondent's Exhibit "A", p. 114);

3. That the district attorney was aware Stringer had a lawyer, knew who the lawyer was, and made no communications with that lawyer to inform same that he was going to talk to Stringer (Respondent's Exhibit "A", p. 116);

4. That the district attorney at no time gave Stringer any **Miranda** or other warnings against self-incrimination (Respondent's Exhibit "A", p. 115);

5. That the district attorney was seeking handwriting samples which could be incriminating evidence without his attorney's advice (Respondent's Exhibit "A", pp. 118-120).;

6. That the district attorney specifically stated: "I think not having his attorney present would have put him (Stringer) at a disadvantage . . . " (Respondent's Exhibit "A", p. 124);

7. That the district attorney felt the fact that Stringer did not have his attorney's advice at the time of the conversation "would . . . have been against his (Stringer's) interests" (Respondent's Exhibit "A", p. 124); and

8. That Stringer would have been afraid not to talk to him (district attorney) and that he did not inform Stringer that he (Stringer) could terminate the conversation at any time (Respondent's Exhibit "A", pp. 126-128).

The district attorney was questioned by an assistant; however, at one point, while seated in the witness box, the district attorney personally objected to a question propounded to him by Stringer's counsel (Respondent's Exhibit "A", p. 125).

After the district attorney's testimony, he resumed personal prosecution of the case and the state rested. Counsel for Stringer moved for a directed verdict of acquittal on the ground that Stringer's signature on the back of the October 31, 1974 check had not been

authenticated and no evidence had been presented that Stringer had converted any funds to his own use. (Respondent's Exhibit "A", pp. 128, 129). Whereupon, the Court summarily denied the motion and Stringer was compelled to take the stand to attempt to explain the district attorney's testimony.

SUMMARY OF RESPONSE TO PETITIONERS ARGUMENT NO. 1

Petitioner admits that the district attorney could have obtained the handwriting by numerous methods other than direct contact with Stringer. To suggest that because Stringer was the Mayor of a small town the district attorney had a duty or owed a "courtesy" to Stringer to call him rather that utilize "proper legal process" is without merit. Stringer does not deny that the district attorney was entitled to "city records" which are surely public; however, as proper methods were available to obtain same, Stringer had a right to counsel when the call (contact) was made. This right was "fundamental". Prosecuting officials simply cannot get around the protective "zone of privacy" which is provided to an indirected accused under the guise of "courtesy" or social respect. The argument,

as presented, is clearly an effort to place a cloud over what was a counselless contract, which issue the Supreme Court has previously decided. Once the "muck" is cleared, no novel question is presented as Petitioner suggests. *UNITED STATES v. MILLER*, 425 U.S. 435, 48 L.Ed. 2d 71, 96 S.Ct. 1619 (1976); *ALDERMAN v. UNITED STATES*, 394 U.S. 165, 22 L.Ed. 2d 176, 89 S.Ct. 961 (1969); *CALIFORNIA BANKERS ASSN. v. SCHULTZ*, 416 U.S. 78, 39 L.Ed. 2d 850, 94 S.Ct. 1526; and *MASSIAH v. UNITED STATES*, 270 U.S. 201, 12 L.Ed. 2d 246, 84 S.Ct. 1119 (1964).

SUMMARY OF RESPONSE TO PETITIONERS ARGUMENT NO. 2

Once an individual has been indicted and the case has become accusatory rather than merely investigatory, it is improper for a prosecuting attorney to make a counselless contact of the indictee and the fruits thereof are inadmissable. *MASSIAH v. UNITED STATES*, 270 U.S. 201, 206, 12 L.Ed. 2d 246, 250, 84 S.Ct. 1119 (1964); *BREWER v. WILLIAMS*, 430 U.S. 387, 51 L.Ed. 2d 48, 88 S.Ct. 234 (1967); and *McLEOD v. OHIO*, 381 U.S. 356, 14 L.Ed. 2d 682, 85 S.Ct. 1556 (1965).

In concluding that the contact made by the district attorney with Stringer was a violation of Stringer's Sixth Amendment rights, the District Court stated: "The securing of an incriminating statement from a defendant who was represented by counsel after indictment in the absence or presence of defense counsel or a waiver thereof is a deprivation of such a defendant's right to counsel . . . (District Court's Memorandum Opinion, p. 2; Respondent's Exhibit "A", pp. 6a, 7a).

The Court's decision is clearly within the bounds of the decided cases. "Interrogation" as used in *MASSIAH* is not limited merely to the act of asking questions, but can exist by the mere nature of the contact as "based on the defendant's preception(s), regardless of the intent of the state in making the contact. *RHODE ISLAND v. INNIS*, 446 U.S. 291, 64 L.Ed. 2d 297, 100 S.Ct. 1682 (1980); and *UNITED STATES v. HENRY*, 447 U.S. 264, 65 L.Ed. 2d 115, 100 S.Ct. 2183 (1980).

Respondent admits that *MASSIAH* does not reach those situations where a clear and knowing waiver of the right to counsel has been obtained; however, such a voluntary and knowing waiver is not presented in this case. *FARETTA v. CALIFORNIA*, 442 U.S. 806, 95

S.Ct. 2525, 45 L.Ed. 2d 562 (1975); and *JOHNSON v. ZERBST*, 304 U.S. 458, 28 L.Ed. 1461, 58 S.Ct. 1019 (1938).

A close analysis of all the underlying and critical facts surrounding the contact made by the district attorney reveals a clear violation of Stringer's Sixth Amendment right to counsel. The District Court's and the Fifth Circuit's decisions are well in line with the decided authority.

SUMMARY OF RESPONSE TO PETITIONERS ARGUMENT NO. 3

The ultimate consideration in every harmless error review is the overall effect the tainted evidence had on the verdict in relationship to the nature of the untained evidence. *CHAPMAN v. CALIFORNIA*, 386 U.S. 18, 176 L.Ed. 2d 705, 87 S.Ct. 824 (1967). In determining whether the admission of same was in fact harmless and that the evidence in no way contributed to the verdict, neither the District Court nor the Fifth Circuit could make such a conclusion. This is not in conflict with *JACKSON v. VIRGINIA*, [443 U.S. 307, 61 L.Ed. 2d 560, 99 S.Ct. 278 (1979)], which dealt with the standard of review to be applied when the ground for appeal is "insufficient evidence to support a verdict".

The state courts relied on both the district attorney's and Stringer's testimonies in order to find that the evidence was not harmless and was also sufficient for a verdict. *STRINGER v. STATE* (Cr. App. Ala. 1979), 372 So. 2d 378, 380, 383, Appendix "C", pp. 29a, 32a). This use was improper in that the district attorney's testimony was obtained in violation of a constitutional right and had a direct affect on the verdict. The testimony of Stringer was a fruit of the earlier erroneously admitted evidence. *FAHY v. CONNECTICUT*, 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229 (1963). The District Court's evaluations in this light were proper and not subject to reversal.

RESPONSE TO PETITIONERS ARGUMENT 1

Petitioners state as their first argument the following:

> "An indicted public official's right as an accused person do not extend to public records under the official's control by reason of his office." (Petitioner's Brief, p. 18)

The Petitioner presents said issue as a novel question which has never been decided by this Court. Clearly, this is not so. The agrument, as stated, simply conglomerates two underlying crucial

determinations, which have heretofore been addressed by this Court; those being:

1. The rights of an indicted person to counsel when contacted by police and prosecutorial officials; and

2. The rights an indicted person has to present discovery and use at trial of his papers, documents or otherwise, which, because of the nature of same, are "public" and not "private".

Stringer does not deny that "public" documents are subject to discovery and subsequent use at trial by prosecuting officials; however, the real question is the manner by which same can be obtained from the criminal defendant. The documents sought from Stringer most certainly could have been gathered by proper legal process (subpoena) or court order. This was the method used in *UNITED STATES v. MILLER*, 425 U.S. 435, 48 L.Ed. 2d 71, 96 S.Ct. 1619 (1976).

The Petitioners attempt to cloud the distinctiveness of the underlying issues by use of the following phraseology:

> "When seeking public records of small towns, such as Hobson City, Alabama, one normally contacts the mayor. If one were to contact anyone else, he would be referred to the mayor. Thus, if the mayor had not been under indictment, no questions would have been raised by the district attorney's call; it would

have been the normal natural thing to do." (Petitioner's Brief, p. 19)

"Mayor Stringer chose to remain active in his office during the pendency of the indictment. It was this situation which led the district attorney to call Mayor Stringer about the city records." (Petitioner's Brief, p. 18)

There is no basis for such general conclusions in the record. At no time did the district attorney state the above were his reasons for making the call nor did he state that the call was motivated by some "courtesy" he owned Stringer. There were many ways to obtain the desired handwriting exemplars. The Malone brothers actually testified for the state; their handwriting samples were easily accessable. A subpoena could have produced any city records the district attorney desired and a court order could have made Stringer give handwriting samples. Stringer has never stated that these would not be proper ways to obtain the desired evidence; however, the petitioner insists that "something" required the district attorney to call Stringer, personally, rather than utilize proper legal process.

In argument to the Fifth Circuit Court of Appeals, petitioner labeled this method of obtaining records a "courtesy call" and characterized the constitutionality of such as follows:

"Since the district attorney could have seized these records without the Mayor's permission (United States v. Miller, 425 U.S. 435, 48 L.Ed. 2d 71, 96 S.Ct. 1619 (1976), the district attorney's call was in the nature of a courtesy due Mayor Stringer's office." (Petitioner's Brief in the Fifth Circuit Court of Appeals, p. 12) (Emphasis Added)

. . . . .

" . . . the district attorney would not have had to obtain Mayor Stringer's lawyer's consent to examine the city records. The records in question did not belong to Mayor Stringer; they were public records open to reasonable inspection by anyone. Therefore, the district attorney could have walked into city hall, examined the records and seized such exemplars as he needed. He would not even have had to obtain a search warrant, since the Mayor certainly had no reasonable expectation of privacy with regard to public records . . . "

"Why, then *did the district attorney not ignore the mayor and examine the records on his own? Why did he call the mayor and ask for permission which the district attorney did not need?* The answer is that in addition to being an indictee, the accused was a mayor. A prosecutor who is called on to prosecute a public official such as a mayor, a legislator or a judge must strike a delicate balance between two paradoxical considerations. On the one hand, the accused is an individual who has the same rights, duties and liabilities as any other citizen. On the other hand, the accused holds an office conferred on him by the people, an office whose dignity should be kept intact for the future. *Therefore, the prosecutor who finds himself in this position should be scrupulously courteous to the accused office holder, because of the dignity of his office, while at the same time the prosecutor vigorously pursues the prosecution.*

> Viewed in this context, the district attorney's call in *this case makes perfectly good sense; it was a courtesy call.*" (Petitioner's Brief to the Fifth Circuit Court of Appeals, pp. 20-21) (Emphasis Added)

This argument simply put begs the Court to give an accused, who is a public official, the constitutional right to "courtesy calls", which right would supersede the indicted criminal defendant's Sixth Amendment right to counsel and Fifth Amendment right against self-incrimination. Such an argument is incredulous and without merit.

As the petitioner, by arguments presented in its briefs, admits that the evidence sought could be obtained by various lawful means, the real question then becomes the right of an indicted person to counsel when questioned by a prosecuting official.

This Court in *ALDERMAN v UNITED STATES*, 394 U.S. 165, 22 L.Ed 2d 176, 89 S.Ct. 961, 967 (1969) stated that its decision did "not deprecate Fourth Amendment rights. The security of persons and property remains a fundamental value which law enforcement officers must respect". The "courteous" thing for the district attorney to have done would have been to respect Stringer's "fundamental" right to counsel. *MILLER*, supra, 96 S.Ct. 1619, 1623, 1625,

which the petitioner cites, this Court espoused that generally "governmental investigative activities" would be proper as long as they did not intrude into a "zone of privacy" or "into the security a man relies upon when he places himself or his property within a constitutionally protected area". As Stringer had been indicted he was within a "constitutionally protected area", that being his right to counsel; not some right to a courtesy call.

As proper legal process existed to obtain the desired handwriting samples, which did not affect Stringer's right to counsel, and did not place the district attorney in a position whereby he could obtain incriminating evidence, petitioners' argument number 1 is without merit.(See: *CALIFORNIA BANKERS ASSN. v. SHULTZ*, 416 U.S. 78-79, 39 L.Ed. 2d 850, 94 S.Ct. 1526). The argument is merely a means by which to disguise the real injustice, that being the counselless contact which is discussed under petitioners' argument number 2 hereinafter.

RESPONSE TO PETITIONERS ARGUMENT NO. 2

As their second argument the petitioners stated:

"The *Massiah* rule does not apply to statements which are not intentionally elicited."

Petitioners suggest that the ruling in this case is contrary to prior decisions of this Court. When the argument is "factually" qualified, such contention is without merit.

First, the lower courts have never stated that *MASSIAH* bars all counselless contracts. The District Court properly concluded that "the securing of an incriminating statement from a defendant who was represented by counsel after indictment *in the absence of presence of defense counsel or a waiver thereof* is a deprivation of such a defendant's right to counsel . . . " (District Court's Memorandum Opinion, p. 2; Respondent's Exhibit "A", pp. 6a, 7a) (Emphasis Added). Certainly, if a waiver is obtained such contracts might be proper.

Under respondent's "Statement of Facts" at least ten separate facts are listed, which succiently demonstrate the nature of this contract by the district attorney. Without reference to the records they are:

1. The call (contact) was made several months post- indictment.
2. The contact was *initiated and made* by the chief prosecuting official to the defendant.

3. Prior to the time the contact was made, the district attorney knew that the defendant was represented by counsel and admitted that he made no effort to contact same.

4. The contact was made in reference to the case for which the defendant had been indicted and not some other independent case or investigation.

5. The information sought by way of the contact could be "incriminating".

6. At no time during the contact was the defendant told any rights, including *Miranda* rights. Defendant never waived his constitutional rights.

7. The district attorney *knew that the contact* put the *defendant at a disadvantage* as he had no attorney present.

8. The district attorney *knew* that the contact *was against the defendant's interests*.

9. The district attorney knew the defendant would be afraid not to talk to him.

10. The district attorney never told the defendant that he did not have to talk to him or that he (Stringer) could terminate the conversation at any time.

When these crucial facts are viewed in light of this Court's decisions, the ruling herein is clearly in line with the decided authorities.

Petitioner contends that the call did not constitute "interrogation" as used in *Massiah*. In defining said term, this Court recently stated in *RHODE ISLAND v. INNIS*, 446 U.S. 291, 64 L.Ed. 2d

297, 100 S.ct. 1682, 1689, 1690 (1980) the following:

> "The term 'interrogation' under Miranda refers not only to express questioning, but also to any other words or actions on the part of the police (other) than those normally attendant to arrest and custody, that the police should know are reasonably likely to elicit an incriminating response from the suspect. The later portion of this definition *focuses primarily upon the perceptions of the suspect, rather than the intent of the police.*" (Emphasis Added)

As *INNIS* involved pre-indictment contacts, surely its arm reaches more firmly around post-indictment situations. The district attorney knew he was placing Stringer at a disadvantage and that same was against his interests. He initiated a contact that he knew Stringer would be afraid to stop. Although his stated intent may have been without fault, a review of the "influencing facts" of same discloses a stated initiated contact, which was ripe for self-incrimination. In *UNITED STATES v. HENRY*, 447 U.S. 264, 65 L.Ed 2d 115, 100 S.Ct. 2183, 2189 (1980), this Court held that a statement made by an indicted defendant to a fellow inmate, who was an undercover agent, was invalid, even though the defendant initiated the conversation. The Court concluded that "by intentionally creating a situation likely to induce Henry to make incriminating statements without the

assistance of counsel, the government violated Henry's Sixth Amendment right to counsel". For the Sixth Amendment to apply the state does not have to be grilling the defendant or actually asking questions of same. In *McLEOD v. OHIO*, 3181 U.S. 356, 14 L.Ed. 2d 682, 85 S.Ct. 1556 (1965), the defendant made incriminating statements while riding with an assistant prosecting attorney and a sheriff. Same occurred after indictment but before the defendant had counsel. His statements were made willingly and the defendant never stated he wanted an attorney. *He was cooperating in a search for evidence of the crime.* The state court attempted to distinguish McLeod's situation from that of *Massiah* in that he had made the volunteered statements to known prosecuting officials. This Court reversed, citing *MASSIAH*, supra. The facts of this case are very similar to McLeod's. District Attorney Field was seeking evidence in Stringer's case to be used against Stringer. He solicited Stringer's cooperation in gathering possibly incriminating evidence by phone call, during which Stringer made an incriminating statement even though he may not have been under direct "interrogation".

The case law is clear that once a defendant has been indicted, he is entitled to have counsel present when he is questioned about anything, especially if the questioning is planned or instigated by some government official. *BREWER v. WILLIAMS*, 430 U.S. 387, 51 L.Ed. 2d 438, 97 S.Ct. 1232 (1977). In *BEATTY v. UNITED STATES*, 389 U.S. 45, 19 L.Ed 2d 48, 88 S.Ct. 234 (1967), an indicted defendant initiated and set up a meeting with an undercover agent and made incriminating statements. Same were completely voluntary and there was no interrogation. This Court held *MASSIAH* applicable.

Stringer admits that some cases have held admissable the introduction of an incriminating statement made by an indicted defendant, but only upon a showing that the defendant waived his right to counsel and that the defendant was made aware of such right from the onset of the contact. *FARETTA v CALIFORNIA*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 562 (1975); *JOHNSON v. ZERBST*, 304 U.S. 458, 58 S.Ct. 1019 28 L.Ed. 1461 (1938); and *CARNLEY v. COCHRAN*, 369 U.S. 506, 8 L.Ed. 2d. 70, 825 S.Ct. 884 (1962). Stringer was never informed of any right he had to counsel at the time the contact was made;

therefore, no waiver question presents itself for review. The rulings of the District Court and the Fifth Circuit Court of Appeals are clearly in line with the cited authorities of this Court.

RESPONSE TO PETITIONERS ARGUMENT NO. 3

The petitioners state as their last argument:

> "The District Court erred in setting aside the state court finding of harmless error on state law grounds."

Petitioner's argument on harmless error relies heavily on the fact that Stringer testified at the trial to essentially the same facts to which the district attorney testified. The record is clear that Stringer did so only in an effort to explain away the district attorney's testimony. The argument as presented cites only one case, that being *JACKSON v. VIRGINIA* [443 U.S. 307, 61 L.Ed. 2d 560, 99 S.Ct. 2781 (1979)], which dealt with the standard of review to be applied when the ground for appeal is insufficient evidence to support a conviction. That case in no wise dealt with constitutional "harmless error" considerations.

The real question is what affect did the district attorney's testimony have on the verdict. Petitioner relies on the findings of the state court in *STRINGER v. STATE* (Cr. App. Ala. 1979), 372 So. 2d 378; Appendix "C"). That court relied heavily on Stringer's testimony at trial, which occurred **after** the state rested, in its recitation of the facts and never referenced the district attorney's evidence. *STRINGER v. STATE* (Cr. App. Ala. 1979), 272 So. 2d 378, 380; Appendix "C", p. 29a) Further, the petitioner argues that the "state courts considered the sufficiency of the evidence and found it sufficient without the district attorney's testimony." (Petitioner's Brief, p. 30) The only statement the Alabama courts made that even remotely comes close to petitioners' argument was a follows:

> "Appellant contends that the evidence was insufficient to show that municipal funds were unlawfully converted. *The State's evidence was that funds were improperly drawn from a city account by appellant for a non-existent obligation.* The custodian of the records for the First National Bank of Anniston testified as to the city's account with that bank and identified the check in question as being drawn on the city's account A microfilmed copy of the October 31, 1974 check was admitted into evidence. Therefore, we think the evidence was sufficient to show a fraudulent conversion of municipal funds." *STRINGER v. STATE* (Cr. App. Ala. 1979), 372 So. 2d 378, 383, Appendix "C", p. 32a).

If anything, this statement shows that the court relied on all the state's evidence including the district attorney's. Nothing suggests otherwise. The petitioners have attempted to read between the lines.

Respondent has recited the material facts in detail under its "Statement of Facts". As the District Court concluded in its analysis of the facts, the critical question was what affect did the district attorney's testimony have on the ultimate verdict. Said court stated that it could not say the effect of same was harmless.

The basis for the test of harmless constitutional error was stated in *CHAPMAN v. CALIFORNIA*, [386 U.S. 18. 17 L.Ed. 2d 705, 710, 711, 87 S.Ct. 824 (1967)] as "whether there *is a reasonable possibility that the evidence complained of might have contributed to the conviction* and requiring the beneficiary of a constitutional error *to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained*. . . the court must be able to declare a belief that it (the testimony or evidence) was harmless beyond a reasonable doubt." (Emphasis added)

The harmless error doctrine, as espoused in

CHAPMAN has been often litigated and the consequences of even the most recent rulings is to firmly implant a burden on the attorney general's office to prove that the testimony of District Attorney Field was harmless beyond a "reasonable doubt" and had no positive influencing effect on the jury verdict. The circuit courts have generally accepted such a burden of proof. See: *UNITED STATES v. ANDERSON*, 523 F.2d 1192 (5th Cir. 1975); *CARVEY v. LeFEVRE*, 611 F.2d 18, 23 (2nd Cir. 1979) ["No reasonable possibility that the jury would have reached a different verdict if the evidence were excluded"]; *UNITED STATES v. YEAGER*, 476 F.2d 613 (3rd Cir. 1973); *UNITED STATES v. HARTMAN*, 627 F2d 7 (6th Cir. 1980); and *EBERHARDT v. BORDENKIRCHER*, 605 F.2d 275 (6th Cir. 1975) ["beyond a reasonable doubt that the error did not contribute in any way to the conviction of the defendant"].

A review of the evidence leaves but one conclusion-that being the importance of the district attorney's testimony. The District Court concluded that prior to District Attorney Field's testifying, "the prosecution had not established its case against (Stringer) except

in an extremely tenuous fashion", and further "due to the fact that without the evidence obtained by the prosecuting official the state's case would have likely failed, it is impossible to conclude that the obtaining of this statement was harmless error" (District Court's Memorandum Opinion, p. 3; Appendix "A", p. 7a). Such conclusions are clearly in line with *CHAPMAN*.

Secondly, the petitioners, in evaluating the evidence and its relationship to the harmless error rule, constantly alluded to the fact that Stringer testified to essentially the same facts as the district attorney. Stringer was put on as a defense witness. The state had already rested its case. After the district attorney had testified, Stringer had no choice but to tell his side. Defense counsel made virogorus objections both to the district attorney's testifying as a witness for the state. (Respondent's Exhibit "A", pp. 113-118, 119) and, secondly, as to the nature of the district attorney's testimony regarding the incriminating statement. (Respondent's Exhibit "A", pp. 113-118, 120).

Everything possible that could be done at the trial to prevent the district attorney from testifying to the incriminating statement was done and was overruled

by the trial court. Once the tainted testimony was in, the entire nature of the case changed, both in terms of the strength of the State's case and in terms of defense tactics.

In *FAHY v. CONNECTICUT* (375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229 (1963), this court spoke directly to this point. In that case the defendant was convicted of willfully injuring a public building by painting swastikas on a synagogue. At the trial a can of paint and a paint brush were introduced into evidence after being obtained by an illegal search and seizure. The defendant objected to the intorduction of same at the trial. The defendant later took the stand and tried to explain his acts. In holding that the tainted testimony (introduction of the brush and paint can) was not harmless, even though the defendant testified that he committed the crime, the court stated:

> "Nor can we ignore the cumulative prejudicial effect of this evidence upon the conduct of the defense at trial. It was only after admission of the paint and brush and only after their subsequent use to corroborate other state's evidence and only after introduction of the confession that the defendants took the stand, admitted their acts, and tried to establish that the nature of these acts was not within the scope of the felony statute under which the defendant had been charged . . . We merely note this course of events as another indication of the prejudical effect on

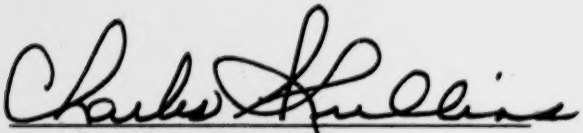
the erroneously admitted evidence." *FAHY*, supra, pp. 232-233.

In accordance with *FAHY*, Stringer's testimony is not to be considered; and, even if it were, arguendo, it cannot be said that the district attorney's testimony had no effect on the verdict. Stringer's testimony was merely a fruit of the poisonous tree. When considered under the proper case authority, the petitioners' third argument is without merit.

CONCLUSION

In conclusion, Stringer submits that this case does not present any question of Federal Constitutional Law which has not been or ought to have been decided by this Court. The decision of the Court of Appeals is clearly in line with the decided opinions of this Court and in no wise conflicts with same. The Petitioner's request that a Writ of Certiorari is, accordingly, due to be denied.

Respectfully submitted,

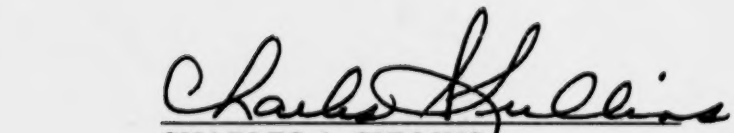


CHARLES A. SULLINS
Attorney for Respondent (Stringer)
206 Randolph Avenue, S.E.
Huntsville, Alabama 35801
Telephone: (205) 539-9571

CERTIFICATE OF SERVICE

I, Charles A. Sullins, Attorney, a member of the Bar of the Supreme Court of the United States, and the attorney for the Respondent, Judge L. Stringer, do hereby certify that on this 20th day of August, 1981, I did serve the requisite number of copies of the foregoing on the Attorney of record for the Petitioners, Sheriff Snead and Forrest Dobbins, by mailing same to him, first class postage prepaid and addressed as follows:

Office of the Attorney General
Hon. Joseph G. L. Marston, III
250 Administrative Building
64 N. Union Street
Montgomery, Alabama 36130



CHARLES A. SULLINS
ATTORNEY AT LAW

ADDRESS OF COUNSEL
206 Randolph Avenue, S.E.
Huntsville, Alabama 35801
Telephone: 205-539-9571